

1 STUART F. DELERY
 Assistant Attorney General
 2 JOSEPH H. HUNT
 Director, Federal Programs Branch
 3 ANTHONY J. COPPOLINO
 Deputy Branch Director
 4 JAMES J. GILLIGAN
 Special Litigation Counsel
 5 BRYAN DEARINGER
 Trial Attorney
 6 RODNEY PATTON
 Trial Attorney
 7 U.S. Department of Justice, Civil Division
 20 Massachusetts Avenue, NW, Rm. 6102
 8 Washington, D.C. 20001
 Phone: (202) 514-3358; Fax: (202) 616-8470

9 *Attorneys for the Government Defs. in their Official Capacity*

10 **UNITED STATES DISTRICT COURT**
 11 **NORTHERN DISTRICT OF CALIFORNIA**
 12 **SAN FRANCISCO DIVISION**

13	FIRST UNITARIAN CHURCH OF LOS)
14	ANGELES, <i>et al.</i> ,)
15	Plaintiffs,)
16	v.)
17	NATIONAL SECURITY AGENCY, <i>et al.</i> ,)
18	Defendants.)

Case No. 3:13-cv-03287-JSW

**GOVERNMENT DEFENDANTS’
 OPPOSITION TO PLAINTIFFS’
 MOTION TO STRIKE THE
 DECLARATIONS OF TERESA H.
 SHEA AND JOSHUA SKULE**

Date: April 25, 2014
 Time: 9:00 a.m.
 Courtroom 11, 19th Floor
 The Honorable Jeffrey S. White

1 On December 6, 2013, the Government Defendants filed a motion to dismiss and
2 opposition to Plaintiffs' motion for partial summary judgment, with supporting declarations from
3 two agency officials: Teresa H. Shea, Signals Intelligence Director, National Security Agency,
4 and Joshua Skule, Acting Assistant Director of the Counterterrorism Division, Federal Bureau of
5 Investigation. Gov't Mot./Opp. (ECF No. 66) & Exhs. A-B. As explained therein, these
6 declarations are pertinent to Plaintiffs' motion for summary judgment, *see id.* at 10-11, and they
7 provide "extrinsic evidence for purposes of resolving Defendants' Rule 12(b)(1) motion" to
8 dismiss for lack of jurisdiction. *Id.* In their opposition to the Government Defendants' motion,
9 and reply in support of their motion for partial summary judgment, Plaintiffs "move" to strike the
10 aforementioned declarations, "in their entirety," "to the extent the government has offered them
11 in support of its motion to dismiss." Pls.' Opp./Reply (ECF No. 72) at 2. They also "move" to
12 strike portions of the declarations as "irrelevant" to the claims on which they seek summary
13 judgment. Plaintiffs have not met the high standard for so "drastic" a remedy as striking a
14 declaration. *Freeman v. ABC Legal Servs., Inc.*, 877 F. Supp. 2d 919, 923 (N.D. Cal. 2012);
15 *Albizo v. Wachovia Mortg.*, 2012 WL 1413996, at *17 (E.D. Cal. Apr. 20, 2012).¹

16 The challenged declarations were properly submitted on the issue of subject-matter
17 jurisdiction, because when, as here, a motion to dismiss attacks "the substance of the complaint's
18 jurisdictional allegations, . . . the court may expand its review and rely on affidavits or any other
19 evidence properly before the court." *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir.
20 2007). *See also Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1120 n.8
21 (9th Cir. 2013); *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012). Furthermore, it
22 was proper for the Government Defendants to cite "documents" and "declarations" to establish a
23 genuine issue of material fact precluding summary judgment as to Plaintiffs' statutory and First
24 Amendment claims, and to show that Plaintiffs have failed to establish an element essential to
25 their case (such as Article III standing) on which they bear the burden of proof at trial. Fed. R.

26 ¹ "Motions to strike are regarded with disfavor," *Benham v. American Serv. Co.*, 2009
27 WL 4456386, at *8 (N.D. Cal. Nov. 30, 2009) (White, J.), "and are infrequently granted."
28 *Freeman*, 877 F. Supp. 2d at 923 (internal quotation omitted). "[I]n most cases, a motion to
strike should not be granted unless 'the matter to be stricken clearly could have no possible
bearing on the subject of the litigation.'" *J & J Sports Prods., Inc. v. Nguyen*, 2014 WL 60014,
at *2-3 (N.D. Cal. Jan. 7, 2014) (citation omitted).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

/s/ James J. Gilligan
JAMES J. GILLIGAN
Special Litigation Counsel
james.gilligan@usdoj.gov
BRYAN DEARINGER
Trial Attorney
bryan.dearinger@usdoj.gov
RODNEY PATTON
Trial Attorney
rodney.patton@usdoj.gov
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Rm. 6102
Washington, D.C. 20001
Phone: (202) 514-3358
Fax: (202) 616-8470

*Attorneys for the Government Defendants
Sued in their Official Capacities*